be vested in the Director-General who may from time make such transfers and direct the employment and distribution of prison officers as he may think fit."

Having regard to all the facts and the law before me, I have no hesitation in saying that the transfer order dated April 22, 1986 seeking to transfer the plaintiff to Tawau Prison issued by the 2nd defendant through the 3rd defendant is valid as being in accordance with the F.M. Prison Ordinance 1952.

In conclusion I did say that the Sabah Ordinance 1956 is a "continuing" Federal law in which the State of Sabah has no longer powers, after Malaysia Day, to amend but in some parts there is still mentioned of the part supposed to be played by the Yang Di-Pertua Negeri. It may be observed that since the Prison Ordinance 1956 became Federal law by virtue of LN.199 of 1965 the State of Sabah has acted, I believe properly, in treating the Sabah Prison Ordinance 1956 as no other than a Federal law administered by Federal authority. It would be inconsistent and repugnant to say that the Yang Di-Pertua Negeri, the State authority, plays a part in administering the Prison Ordinance Sabah, it being already a Federal law administered by Federal authority. I am, therefore, of the view that the Prison Ordinance Sabah even if it is used, the repugnant provisions of the Ordinance tending to nullify the exercise of its powers by Federal authority, ought to be disregarded and has been so disregarded in its application and the Sabah Ordinance is therefore to be read in that light. Indeed in the *Minister of Home Affairs* v. *Datuk James Wong*[1] *(supra)* the Federal Court considered the choice of the use by the Federal authority of the PPSO Sarawak and the Internal Security Act 1960, and the Federal Court held that in matters of issuing a detention order the Federal authority could employ the use of either the Internal Security Act or the Sarawak PPSO but if the latter is employed, then such order is only effective within the State of Sarawak. In a similar way in the present case, on the same principle, the Federal authority can with the aid of Act A514, section 9, use either the Prison Ordinance 1952, and had in fact so used or the Sabah Prison Ordinance 1956 with modifications (see *Assa Singh* v. *Menteri Besar, Johor*[5]). If and when the Federal authority uses the former Ordinance the Sabah Ordinance must remain redundant in its application insofar as that part is covered by the F.M. Ordinance No.81 of 1952 or Act A514, for example, provisions on appointments, terms of service and in matters of discipline. For reasons given, I dismiss the plaintiff's originating summons with costs to be taxed.

Order accordingly.

Solicitors: *Skinner Lind Robertson Willie Wong Chin & Co.*

SUBRAMANIAM LAKSHAMANASAMY v. DATUK S. SAMY VELLU & 4 ORS.

[O.C.J. (Mohamed Dzaiddin J.) May 27 & June 22, 1987]

[Penang – Suit No. 22-50-87]

Administrative Law – Political party branch election – Ex parte injunction restraining nomination – Application to discharge injunction – Membership of branch less than required number – Exhaustion of domestic remedy – Whether injunction should be discharged.

Legal Profession – Counsel gainfully employed as Deputy Speaker of Dewan Raayat – Locus standi to appear as counsel – Practice certificate – Legal Profession Act, 1976, s.30 – Federal Constitution, arts. 57(5) & 58.

This application concerns the Malaysian Indian Congress Penang Branch elections. The plaintiff had obtained an *ex parte* interim injunction restraining the defendants, their agents or servants from receiving any nomination papers in respect of the nomination of candidates for the elections. The defendants applied to discharge the injunction. Plaintiff's counsel challenged the standing of defendants' counsel.

The issue in the plaintiff's writ was whether the defendants were acting within the Party's Constitution when they declared "defunct" the Malaysian Indian Congress Tanjong West Branch. The plaintiff contended that the said branch was wrongfully declared as "defunct." The defendants showed that 41 photocopies of the identity cards of the total members of 115 from the branch were falsified, thus reducing the membership to 71. Under article 19.12, the membership of the Branch Congress shall not be less than 100. Under article 91 of the Party Constitution, the plaintiff was precluded from resorting to court proceedings unless and until such matter was first referred to the Central Committee.

Held: (1) so long as counsel is on the roll of advocates and solicitors and has a valid practising certificate, he has an exclusive right to appear and plead in all Courts in Malaysia;

(2) the defendants had made a sufficient case for the discharge of the interim injunction;

(3) damages, if any, to be assessed by the Registrar;

(4) costs in the cause.

Per curiam: The Court could, in the circumstances of the application, hear it *ex parte*.

Cases referred to:

(1) *London City Agency (JCD) Ltd. & Anor.* v. *Lee & Ors.* [1970] 1 Ch. 597.

(2) *Datuk Pasamanickam & Anor.* v. *Agnes Joseph* [1980] 2 M.L.J. 92.

APPLICATION.

D.P. Vijandran for the defendants/applicants.

Maikal Yasu (*N. Shanmugam* and *Tanasekharan Autherapady* with him) for the plaintiff/respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This was an application by the defendants to discharge the interlocutory injunction which I granted *ex parte* against them on May 23, 1987 at the instance of the plaintiff.

In essence, the interim injunction restrained the defendants, their agents or servants from receiving any nomination papers in respect of the nomination of candidates for the Malaysian Indian Congress Penang Branch elections which was fixed on the same day when the Order was granted. The injunction further restrained the defendants from holding the Penang State Congress election pending the declaration by this Court of the status of the Malaysian Indian Congress Tanjong West Branch, where, by an indorsement on his writ of summons, the plaintiff prayed for a declaration that the said Tanjong West Branch was not a "defunct" branch by virtue of article 20 of the Malaysian Indian Congress Constitution.

Due to the urgency of the matter, Messrs D.P. Vijandran Associates, solicitors for the defendants, filed this summons on May 27, 1987 seeking this Court to hear the matter immediately. Mr. D.P. Vijandran, together with Datuk T. Subbiah, appeared before me on the same morning seeking my indulgence to hear the matter *ex parte*. I then fixed the hearing in the afternoon where counsel for the plaintiff were present. In fact they were aware that the defendants' counsel were in the corridor of my Court armed with an *ex parte* summons that morning. As the parties were present in the afternoon, I assumed that the application was made upon due notice given to the plaintiff's solicitors and counsel were prepared to argue the defendants' application without filing any affidavit-in-reply. In my opinion, even if I was wrong in my assumption, based on the authority cited to me by Mr. Vijandran, I could in the circumstances of this application hear it *ex parte*. In *London City Agency (JCD) Ltd. & Anor.* v. *Lee & Ors.*[1] the plaintiffs on an *ex parte* application were granted an interlocutory injunction restraining the defendants from parting with moneys in the bank until a certain date "or until further order in the meantime." The plaintiffs later gave notice of motion to the defendants for an injunction in similar terms "until further order." Before the day fixed for that hearing, the defendants applied to the court *ex parte* by motion for an order to discharge or vary the injunction already granted. The matter came up for hearing before Megarry J. who decided, *inter alia*, on one point of practice, which is, whether an interlocutory injunction could be discharged or varied on an *ex parte* application. At page 599 the learned judge said:

> "In my judgment the court has ample jurisdiction to make such an order, and there is no established rule of practice to prevent the court doing so in a proper case. I do not accept what is said in Halsbury as a correct statement of the present law. The court will grant an interlocutory injunction on an *ex parte* application if a case of sufficient cogency is made, and no reason has been suggested why, if an application *ex parte* to discharge or vary such an injunction is supported by sufficiently cogent grounds, the court should not do what is sought. If time permits, it is plainly preferable that any such application should be made upon due notice; but in a case of sufficient urgency, I do not see why an injunction granted *ex parte* should be immune from being varied or discharged upon an *ex parte* application. I cannot believe it to be the law that however clearly it has been established that it would be wrong for the injunction to continue in force unchanged, *i.e.* the court is impotent to discharge or vary it until notice of motion has been given and has expired, especially where (as here) counsel for those entitled to the injunction has in fact been present on the hearing of the *ex parte* application for the discharge or variation. Accordingly, in my judgment, the only question here is whether the applicants *ex parte* have made out a sufficient case for discharging or varying this injunction."

Turning now to the application proper, let me first deal with the preliminary objections raised on behalf of the plaintiff. Mr. N. Shanmugam, one of the counsel for the plaintiff, raised three issues, two of which related to the form rather than the substance of the Summons-in-Chambers. However, the third objection concerned the standing of Mr. Vijandran, counsel for the defendants in this matter. Counsel submitted that Mr. Vijandran has no *locus standi* as counsel by virtue of his being gainfully employed as the Deputy Speaker of Dewan Raayat and under section 30(3) of the Legal Profession Act 1976, he should surrender his practice certificate to the Registrar. Now, section 30 provides:

"30. Disqualification for practising certificate.

(1) No advocate and solicitor shall apply for a practising certificate –

(a) unless he is practising or intends to practise either on his own account or in partnership in Malaysia; or

(b) unless he is or is about to be employed full time in his practice in Malaysia by an advocate and solicitor or a firm of advocates and solicitors in practice in Malaysia; or

(c) if he is gainfully employed by any other person, firm or body in a capacity other than as an advocate and solicitor.

(2) For the purpose of this section a qualified person shall not be construed as being gainfully employed if he is serving in the Judicial and Legal Service.

(3) Any qualified person who is gainfully employed in accordance with paragraph (c) of subsection (1) shall surrender his practising certificate to the Registrar."

Clearly, under section 30(1)(c) no advocate and solicitor shall apply for a practising certificate if he is gainfully employed by any other person, firm, or body in a capacity other than as an advocate and solicitor. However, in this case I did ascertain from Mr. Vijandran whether he possessed a valid practising certificate. He confirmed that he had. Therefore, on the strength of his practising certificate Mr. Vijandran has an exclusive right to appear and plead in this Court under section 35(1) of the Act. On the question whether he is gainfully employed by virtue of being a Deputy Speaker, I think it is not disputed that as Deputy Speaker he is paid remuneration from the Consolidated Fund (article 58 of the Federal Constitution). However, whereas under article 57(5) of the Constitution a Speaker shall be disqualified from holding office if after three months of his election or at any time thereafter he becomes a member of any board of directors or board of management, or an officer or employee, or engages in the affairs or business, of any organisation or body, whether corporate or otherwise, or any commercial, industrial or other undertaking, whether or not he receives any remuneration, reward or profit or benefit (provided of course such disqualification does not apply where such organisation carries out welfare or voluntary work or objective beneficial to the community or any part thereof or any other work or objective of a charitable or social nature and he does not receive any remuneration, reward or profit from it), there is no provision in the Constitution regarding the position of the Deputy Speaker. Thus, in my judgment, until the law is amended, so long as Mr. Vijandran is on the roll of advocates and solicitors and is issued with or possesses a valid practising certificate, he has an exclusive right to appear and plead in all Courts in Malaysia. I may only comment that this is a matter for the Bar Council to look into.

On the main application, the issue in the plaintiff's writ was whether the defendants were acting within the Party's Constitution when they declared the Malaysian Indian Congress Tanjong West Branch as "defunct" under article 20. It was the plaintiff's contention that the said branch was wrongfully declared as "defunct" by the defendants and that the said declaration had deprived the plaintiff and other members of the Branch from utilising their rights and privileges given by the Party's Constitution. From the supporting affidavit of Datuk M. Mahalingam, the Party's Secretary General, the defendants have shown several grounds for the discharge of the injunction. One of the grounds was that the plaintiff had left out certain pertinent facts which were material to the issues before the Court. These facts related to the question of an alleged false membership in several Malaysian Indian Congress Branch Congresses in Penang. The Central Working Committee of the Malaysian Indian Congress carried out a membership verification exercise to ascertain the truth of this allegation and discovered that 41 photocopies of the identity cards of the total members of 115 from the Tanjong West Branch were falsified, thus reducing the membership to 71. Under article 19.12, the membership of the Branch Congress shall not be less than 100. In consequence thereof, the Central Working Committee sent a telegram to the said Branch stating its defunct position and that a letter would follow to explain the true position. In the meantime, the plaintiff chose to file a writ against the defendants for a declaration that the said Branch was not defunct, followed by this interim injunction. Further, Mr. Vijandran submitted that under article 91 of the Party's Constitution the plaintiff was precluded from resorting to court proceedings unless and until such matter was first referred to the Central Committee. According to counsel, this condition precedent was not followed by the plaintiff in the first place. Article 91 reads as follows:

"COURT PROCEEDINGS:

Every member shall be bound by the decision of the Central Working Committee in matters relating to his rights, obligations, duties and privileges as a member of the Congress. If he resorts to court proceedings in respect of his rights, obligations, duties and privileges or on behalf of any other member or in respect of the rendering or meaning of the provisions of this Constitution without first referring to the Central Working Committee or in violation of any decision or directive of the Central Work-

ing Committee, he shall *ipso facto* cease to be a member of the Congress and shall not be entitled to exercise any of the rights of a member."

This article is *in pari materia* with the former article 15(4) of the said Constitution which was dealt with by the Federal Court in *Datuk Pasamanickam & Anor.* v. *Agnes Joseph.*[2] In that case the respondent sought a declaration that the annual general meeting of the Parit Bakar branch of the Malaysian Indian Congress held on March 1979 was unconstitutional and unlawful and therefore ineffective, null and void. The appellants' appeal against the decision was allowed by the Federal Court. Raja Azlan Shah C.J. (Malaya) (as he then was) delivering the judgment of the Court stated at page 95 as follows:

"It is trite law that the relationship between the Malaysian Indian Congress (a registered society under the Societies Act) and its members is based on contract and the terms of the contract as embodied in the Malaysian Indian Congress Constitution will *prima facie* be binding on the parties. Article 15(4) of the said Constitution impliedly forbids members from resorting to court proceedings in matters relating to their rights, obligations, duties and privileges unless and until such matters are first referred to the Central Working Committee. The said article reads as follows: ...

In the present case article 15(4) provides as a first step that reference to the Central Working Committee is a condition precedent before resorting to court proceedings. The effect of this is that a member is not excluded from going to court but must first refer the matter to the domestic forum. It has been held in *Scott* v. *Avery, supra,* that such a clause is legitimate and not contrary to public policy. The effect of the decision is that an agreement that no right of action shall arise by action in the courts unless and until the parties' differences have been settled in some other way, for example by arbitration, is not void as being an ouster of the jurisdiction of the courts. See also 10 *Halsbury's* (4th ed.) 326-327, para. 719."

In the circumstances of the whole case, I found the defendants had made a sufficient case for me to discharge this interim injunction. I therefore made an order in terms of paragraphs (a) and (c) of the defendants' application. Damages, if any, to be assessed by the Registrar. As for costs, in view of further hearing of prayer (b) whereby the defendants had applied to strike out the plaintiff's writ under Order 18 rule 19 Rules of the High Court, I ordered the costs of the present application to be costs in the cause.

Order accordingly.

Solicitors: *D.P. Vijandran Associates; Maikal, Tana & Co.; Shan, Gooi & Huang; V.P. Nathan & Partners.*

KOH YOKE KOON v. MINISTER FOR HOME AFFAIRS, MALAYSIA & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) July 8, 1987]

[Penang – Criminal Application No. 54-3-86]

Administrative Law – Habeas Corpus – Detention of accused in police custody exceeding maximum period for detention – Subsequent Detention Order by Minister for continued detention of accused – Effect of – Whether legal and authorised – Federal Constitution, art. 5(1) – Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1).

Constitutional Law – Habeas corpus – Detention of accused in police custody exceeding maximum period of detention – Subsequent Detention Order by Minister for continued detention – Violation of Federal Constitution, art. 5(1).

On October 1, 1986 at about 12.20 a.m., acting on information received, the applicant Koh Yoke Koon was arrested by the police at a stall in Jalan Solok, Tangkak, Muar, Johore. The applicant was then remanded in custody under section 117 of the Criminal Procedure Code for 14 days pursuant to an order made by a Magistrate. He was released on October 14, 1986, but on the same day he was re-arrested and detained at Muar police station pending inquiries under section 3. Upon the conclusion of these investigations, the police submitted a report to the Ministry of Home Affairs.

On December 9, 1986, the Deputy Minister for Home Affairs signed the Detention Order under section 4 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 authorising the detention of the applicant for a period of two years with effect from December 12, 1986.

The applicant, therefore, challenged the validity of the Detention Order by the Minister and the detention thereunder.

Held, granting the habeas corpus and setting the applicant free: (1) having regard to the provisions of the Ordinance, the requirements therein as to the place of detention even though procedural are mandatory in character and so breaches thereof cannot be condoned;

(2) the applicant's period of detention in police custody at the Muar police station from December 14, 1986, until some time in the morning of December 16, 1986 when he was removed to the Rehabilitation Centre was wholly unauthorised and therefore in violation of Article 5(1) as being otherwise than in accordance with law;

(3) the Detention Order will not operate to salvage the case for the detaining authority for it specificially provided for detention at the Centre for two years from December 12, 1986 and cannot therefore have the effect of rendering legal the applicant's illegal detention at the Muar police station from December 14, 1986 until his removal therefrom on the morning of December 16, 1986;

(4) the detention of the applicant under section 4(1) was not procured by steps all of which were entirely regular nor was the court satisfied that "every step in the process"